

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 485 of 2003

With

CIVIL APPLICATION NO.1189 OF 2003

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI

and

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

REKHA @ TARKESHWARI RAJESHBHAIMAKWANA

Versus

RAJESHBHAI CHHAGANLAL MAKWANA

Appearance:

1. First Appeal No. 485 of 2003
MR NILESH M SHAH for Appellant No. 1
MR ASHUTOSH R BHATT for Respondent No. 1
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CORAM : MR.JUSTICE D.K.TRIVEDI

and

MR.JUSTICE K.M.MEHTA

Date of decision: 07/03/2003

COMMON ORAL JUDGEMENT

(Per : MR.JUSTICE D.K.TRIVEDI)

1. Admit. Mr. Bhatt, learned advocate, waives service of notice of admission on behalf of respondent husband. By consent of the counsel appearing in the matter the Appeal is fixed forthwith. Printing dispensed with. As the record and proceedings are available with us, filing of paper book is also dispensed with.

2. Heard Mr. Shah, learned advocate for the appellant - original opponent wife and Mr. Bhatt, learned advocate, who appeared for the respondent original petitioner husband. Mr. Shah has while arguing the matter taken us through the Judgment under challenge passed by the Family Court No.4, Ahmedabad on 13.9.2002 in H.M.P.No.1225 of 2000 filed by the respondent husband for seeking divorce under Section 13 of the Hindu Marriage Act. It is the contention of Mr.Shah while taking us through the Rojnama that though the appellant was represented through advocate and a detailed written statement was filed at Exh.6 denying the case of the husband for seeking divorce, as found from the Rojnama, the Family Court has proceeded with the case hurriedly in absence of the appellant and her advocate and the evidence in the form of affidavit led by the husband had remained unchallenged. He has also with the help of the record and proceedings demonstrated before us that even after the affidavit was filed by the respondent husband, no attempt is made either by the advocate or the court to send the same to the appellant and according to Mr. Shah, Family Court has accepted the case of the husband with the result that the decree for divorce was granted by the Family Court and the marriage between appellant and the respondent, which was solemnized on 23.5.94, was dissolved.

3. Mr. Bhatt, learned advocate appearing on behalf of the respondent husband has while supporting the judgment under challenge vehemently urged that though the written statement was submitted by the appellant wife and though Family Court has adjourned the matter on various occasions, appellant wife had neglected to remain present and the learned Judge of the Family Court has while resorting to the provisions of C.P.C. allowed the petition by granting decree for divorce by holding that the petitioner husband has established the case for seeking divorce. It is the submission of Mr. Bhatt that as can be seen from the Rojnama, it is only the appellant wife original opponent who had remained absent, with the result that the appellant wife was not co-operating and

delayed the proceedings and ultimately the Family Court has rightly proceeded with the petition filed by the husband for seeking divorce and the Family Court has while accepting the case of the petitioner husband, based on the evidence, allowed the petition and according to him the Appeal deserves to be dismissed.

4. Considering the submission made before us and on perusing the record and proceedings of the case as well as the Rojnama it transpires that the parties were represented through their advocates. It is further found that on number of occasions the appellant - wife and her advocate had remained absent when the proceedings were fixed before the Family Court. However, as found from the record that on an affidavit filed by the petitioner husband in the said proceedings, which was granted by the Family Court, the Family Court has proceeded with the hearing of the said case to examine the affidavit, which was filed by the husband and in light of the documents admitted and produced before the Family Court, the Family Court has allowed the petition. It is the case of the respondent - husband that after their marriage was solemnized and due to pregnancy of the wife, she had gone to her parents place on the occasion of first delivery and even after the baby was born, several attempts were made to bring the wife back. However, it is only because of the attitude of the wife, all attempts had failed to bring wife back and the wife had remained with the parents and the wife was giving priority to her father rather than to her husband. Since 1996 the wife has neglected the husband and it is only after issuing legal notice that the petition for divorce was filed and the same was decreed on the basis of the evidence in the form of the affidavit of the respondent husband.

5. On perusing the entire record and proceedings and without expressing on the merits in respect of the contentions raised by the counsel appearing in the matter, we are of the view that in the interest of justice, the matter requires consideration by the Family Court by giving opportunity to the appellant wife to lead evidence in support of her case as well as to permit her to cross-examine, if necessary, the respondent husband as the Family Court has decided the case by examining the evidence on the form of affidavit filed by the respondent - husband. As found from the record, that the petition for divorce was filed by the husband before the Family Court on 27.3.2000 and the petition for divorce was decreed by the Family Court on 13.9.2002. Exh.40 is filed by the husband disclosing that he had filed affidavit by highlighting that wife is for some obvious

reason not attending the court and requested the court that in light of the affidavit filed by him and in the interest of justice, the Court may decide the matter. Said Application Exh.40 was submitted on 8.8.2002 and on the very day application of the husband was granted. The Court has passed the following order, which reads as under:-

"Permission granted to lead evidence on affidavit."

Exh.41 is the affidavit of the husband dated 8.8.2002. As found from the said affidavit it transpires that the copy of the said affidavit is not furnished to the wife, namely, present appellant nor to her advocate and the Family Court has accepted the said affidavit of the husband. Exh.42 is the judgment and decree for divorce as prayed for by the husband. We may also express that the appellant as well as her advocate were negligent by not remaining present before the Family Court when the matter was kept by the Family Court for hearing. The Rojnama also suggest that on number of occasions the advocate for the appellant wife and the appellant wife had remained absent. Exh.19 is submitted by the appellant wife before the Family Court under Section 24 of the Hindu Marriage Act and Section 18 of the Hindu Adoption and Maintenance Act, 1956 wherein she has prayed for maintenance of her minor daughter. Application dated 6.2.2002 is submitted by the appellant wife wherein the appellant wife has prayed that she is not in a position to engage advocate and maintain her minor daughter and the court may grant an amount of Rs.10,000/-- for the purpose of engaging a lawyer to defend her case and Rs.2000/-per month for the maintenance of the minor daughter. Said Application Exh.19 was rejected by the Family Court on 10.7.2002. After the rejection of the Application Exh.19 on 10.7.2002, the Family Court has kept the matter on 29.7.2002 and the Court was busy for some other work and the appellant wife was absent and the court has adjourned the matter on the next date i.e. on 2.8.2002. On 2.8.2002 though the husband was present, however the court was busy in some other work and the court had adjourned the matter and kept the matter on 8.8.2002. On 8.8.2002 appellant wife was absent and her advocate was also absent and on that day the court has admitted the document produced by the husband. On 28.8.2002 the court has heard the argument of the husband and the matter was kept for judgment on 13.9.2002 and on 13.9.2002, the court has allowed the petition in favour of the husband by granting decree for divorce.

6. In our view and as observed earlier, the appellant wife has not remained present before the Court and further though she has engaged an advocate to represent her case, her advocate has also not remained present before the court. It is also to be seen that Application Exh.19 was submitted at the instance of the appellant wife wherein she has prayed for maintenance of her daughter as well as the amount of Rs.10,000/-- to meet the expenses to defend the case filed by the husband. Said Application for maintenance Exh.19 was rejected. As found from the record Exh.40 - an application was submitted by respondent husband requesting the court to permit him to lead evidence on affidavit, which was granted. The affidavit filed by the respondent husband before the Family Court was not served either to the appellant nor to her advocate. Normally when the court proceedings are there and when any advocate or the party itself has remained absent, court is also required to see that the same is forwarded to the party and the Registry is also required to inform the party or advocate by adjourning the matter on the next date. On examining the record, admittedly the affidavit filed by respondent husband is not received by the appellant wife nor by her advocate and the court has proceeded further by granting Application made by the respondent husband, namely, Exh.40. Only on this ground, we are of the view that ends of justice will meet if opportunity is given to the appellant wife to lead evidence in support of her case and also to cross-examine the respondent husband, when the Family Court has proceeded with the case by granting Application Exh.40 and on the strength of request made under Application Exh.40, the respondent husband has filed affidavit. As observed earlier, we have not dealt with the contentions raised before us by the counsel appearing in the matter on the merits of their case. According to us, the decree for divorce was passed on considering the evidence led by the respondent husband on affidavit and no opportunity was given to the appellant wife to lead evidence in support of her case. Keeping this in our mind and as found from the plaint, that it is the case of the respondent husband that both are residing separately since 1996 and there was no response from the appellant wife, though attempt was made by arranging the meeting of their caste. Accordingly, it is the case of the respondent husband that though attempt was made to call the appellant wife, after she delivered a baby child, she had not returned and after issuance of legal notice as there was no response from the wife, a petition for divorce was filed before the court in the year 2000, which was decreed by the learned trial Judge on

13.9.2002. As observed earlier, without examining the contentions raised before us on merits, we set aside the decree under challenge and it will be necessary for us to give directions to the parties as well as to the Family court to decide the matter in accordance with law with time bound programme. Counsel appearing in the matter had also assured us that the parties will remain present before the Family Court and as the parties were represented through advocates, their advocates will also remain present before the Family Court and accordingly as per the assurance given by the counsel appearing in the matter, they have agreed that they will remain present before the Family Court, Ahmedabad on 25.3.2003. Accordingly the Family Court is directed to take case on hand and fix the date of the case when the parties will remain present before the court i.e. on 25.3.2003 and the Family Court shall consider the request of the appellant wife, if she desires, to cross examine the respondent husband as the Family Court has proceeded with the case on the affidavit filed by the husband. The Family Court is also directed to give opportunity to the parties to lead evidence in support of their case. In view of the directions given above, Family Court shall proceed with the said case and dispose of the same in accordance with law by 31.8.2003. Appeal is accordingly allowed in the above terms. However, there will be no order as to costs.

The Registry of this court is directed to send back the record and proceedings forthwith in favour of the Family Court.

In view of the order passed in main Appeal, Civil Application No.1189 of 2003 does not survive and the same stands disposed of accordingly. Rule is discharged. Interim relief stands vacated. No order as to costs.

(D.K.Trivedi, J)

(K.M.Mehta, J)

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